In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 403

BANCO NACIONAL DE CUBA, PETITIONER,

v.

PETER L. F. SABBATINO, AS RECEIVER, AND F. SHELTON PARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE AND HELEN G. DOWNS, CO-PARTNERS DOING BUSINESS AS FARR, WHITLOCK & CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

By order of the Court, dated November 20, 1962, the Solicitor General was invited to express the views of the United States. For the reasons indicated below, we believe that the case is one which warrants review by this Court.

1. Two broad and important questions are presented. The first is whether both courts below correctly held that they were not precluded by the Act of State doctrine from adjudicating the validity of certain acts of the Cuban Government. If that ques-

670607—62——1

tion is answered in the affirmative, a second question is posed, *i.e.*, by what standards are domestic courts to be guided in adjudicating the validity of the acts of the foreign state?

Specifically, this litigation involves a challenge to the seizure of property of a private corporation by a sovereign act of the Government of Cuba. As it happens, the plaintiff (petitioner in this Court) is not the former owner seeking to recover its property, but an agency of the foreign sovereign seeking to recover the property (or its proceeds) against a receiver appointed under a statute of the State of New York, who is holding the property for the benefit of shareholders of the former owner. New York Civil Practice Act, Sec. 977–b. In its essential aspects, the case is typical, however, of a large number of pending cases in which the jurisdiction of American courts has been invoked to challenge the validity of foreign nationalizations of property located, at the time of the taking, in the nationalizing country.

A series of such cases was brought in the United States after World War I arising out of nationalizations by the U.S.S.R. See *e.g. Sokoloff* v. *National City Bank*, 239 N.Y. 158, 145 N.E. 917 (1924); *Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933); *Dougherty* v. *Equitable Life Assur. Soc.*, 266 N.Y. 71, 193 N.E. 897 (1934). More recently, nationalizations in Iran and Indonesia have stimulated a series of cases in foreign courts, though not in the United States. See *e.g.* (Japan) *Anglo-Iranian Oil Co.* v. *Idemitsu Kosan Kabushiki Kaisha* [1953], Int'l L. Rep. 305 (1953); (Aden) *Anglo-*

Iranian Oil Co. Ltd. v. *Jaffrate* [1953], Int'l L. Rep. 316, 47 Am. J. Int'l L. 325 (Supreme Court of Aden, 1953); (Italy) *Anglo-Iranian Oil Co. Ltd.* v. *S.U.P. O.R. Co.* [1955], Int'l L. Rep. 19 (Court of Venice, 1953); (Italy) *Anglo-Iranian Oil Co., Ltd.* v. *S.U. P.O.R. Co.* [1955], Int'l L. Rep. 23 (Civil Court of Rome, 1954); (Germany) *N. V. Verenigde Deli-Maatschapijen and N. V. Senembah-Maatschappij* v. *Deutsch-Indonesische Tabak-Handelsgesellschaft m. b. H,* Landgericht Bremen, April 21, 1959, 1959 Aussenwirtschaftsdienst des Betriebsberaters 105; Oberlandesgericht Bremen, August 21, 1959, *ibid.,* 207; (Netherlands) *Senembah Maatschappij N. V.* v. *Republik Indonesie Bank Indonesia and de Twentsche Bank N. V.,* Court of Appeals of Amsterdam (1959), Nederlandse Jurisprudentie 218 (No. 73), affirmed (1959) Nederlandse Jurisprudentie 855 (No. 350).

The Cuban nationalizations, which affect in very substantial measure interests of United States citizens have already brought a number of challenges in our courts. As of December 5, 1962, 37 such cases (Appendix A, *infra,* pp. 11–13) were pending in the Southern District of New York alone, some of them involving millions of dollars. The instant decision, which has attracted very wide attention and has already been cited with approval in two Fifth Circuit cases (*Menendez Rodriguez* v. *Pan American Life Insurance Co.,* No. 19130 decided, October 17, 1962; *Pan American Life Insurance Co.* v. *Blanco,* No. 19569, decided November 7, 1962) will doubtless have wide influence upon the disposition of this growing body of litigation.

The court below, affirming the decision of the District Court for the Southern District of New York, held that the acquisition of property in Cuba by the Government of Cuba was subject to review under standards of international law; that the decree by which the Cuban Government acquired the property was in violation of international law; and that, therefore, the Cuban Government could not be said to have title to the property. Thus the court of appeals has passed both upon the reviewability of an act of a foreign state and upon the question of the standards by which an act of nationalization is to be judged. Neither of these questions has been recently examined by this Court, and, in our view, both have substantial public importance.

2. In *Oetjen* v. *Central Leather Company*, 246 U.S. 297, and *Ricaud* v. *American Metal Company*, 246 U.S. 304, this Court held that the former owner of property confiscated by the Government of Mexico could not recover the property when it came into the United States, even if the property had been taken, as alleged by plaintiffs, in violation of international law. This was so, said the Court, because of the "principle that the conduct of one independent government cannot be successfully questioned in the courts of another * * *" (246 U.S. at 303). The *Oetjen* and *Ricaud* decisions were based on an earlier decision of this Court in *Underhill* v. *Hernandez*, 168 U.S. 250, in which Chief Justice Fuller, speaking for the Court, wrote (p. 252):

> Every sovereign State is bound to respect the independence of every other sovereign

> State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

The New York Court of Appeals has applied this doctrine to the acts of a *de facto* government not recognized by the United States (the Soviet Union), *Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 186 N.E. 679 (1933), and the Court of Appeals for the Second Circuit has applied it to the acts of a government (Republic of Spain) recognized by the United States at the time of the act but not at the time of the decision of the case, *Banco de Espana* v. *Federal Reserve Bank*, 114 F. 2d 438. The Second Circuit also applied the doctrine to defeat the claim of a former German Jew to property taken from him as the result of confiscatory and discriminatory acts of the Nazi Government of Germany, *Bernstein* v. *Van Heyghen Freres, S.A.*, 163 F. 2d 246, certiorari denied, 332 U.S. 772. In that case, the court said that, although the Government of Germany no longer existed and the alleged acts were incompatible with American standards, the remedies were up to the Executive Branch (through such means as the restitution and reparations procedures then being worked out) and that claims generated by the acts of the German state could not be adjudicated in our courts.

Following the decision in the first *Bernstein* case, counsel for the plaintiff wrote to the Department of State to ascertain the views of the Executive Branch. He received a reply (with copies for counsel to all

the parties and the court) from the Acting Legal Adviser, Department of State, stating that:

> The policy of the Executive with respect to claims asserted in the United States for restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials. [Dept. State Bull. 592 (May 8, 1949).]

In a subsequent case brought by the same plaintiff against different defendants, but upon substantially similar facts, the court of appeals, amending an earlier decree, 173 F. 2d 71 (C.A. 2), held that the letter from the Acting Legal Adviser removed the restraint the courts had been under in examining the acts of the foreign government, and ordered the district court to try the case on the merits. *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij,* 210 F. 2d 375 (C. A. 2).

3. The premise of the two *Bernstein* cases, read together, is that a court will not examine into the acts of a foreign state affecting property within the latter's territory unless the Executive Branch states, in some formal manner, that it has no objection to such examination. Cf. Restatement, *The Foreign Relations Law of the United States,* Sec. 44 (proposed official draft, May 3, 1962). We take no position at this time as to whether this is a permissible or desirable limitation on the Act of State doctrine. The

court of appeals in the instant case assumed that it had a "Bernstein letter", 307 F. 2d 845, 858 (C.A. 2), but a full account of the correspondence and surrounding circumstances (which counsel did not lay before the court) makes it plain that the assumption was erroneous.

The correspondence in question (Appendix B, *infra*, pp. 14–43) took place between October 10, 1961 and November 21, 1961, *i.e.*, after the briefs in the court of appeals had been filed. In that interval, counsel for the receiver addressed one letter to the Secretary of State and counsel for the amici curiae directed 11 letters to members of the Executive Branch, including the Solicitor General, the Secretary of State, the Under Secretary of State for Economic Affairs, the Legal Adviser, the Deputy Legal Adviser and the Special Assistant to the Legal Adviser, Department of State, the Assistant Secretary of State for Inter-American Affairs, and the Administrator, Agency for International Development. While the letters differed in detail, the purpose of all of them was to obtain agreement from the Executive Branch with the position of the respondents and the amici curiae. They contrasted statements issued by the Department of State in the Summer of 1960 condemning the Cuban nationalizations with certain statements by the State and Justice Departments in the course of a lawsuit involving the M. V. *Bahia de Nipe* in August aand September, 1961, *Rich* v. *Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E.D. Va.) affirmed 295 F. 2d 24 (C.A. 4). Ultimately, they sought from the Executive Branch,

and particularly from the Department of State, a clear declaration that would serve to lift any restraint upon the judiciary's examination of acts of nationalizations by the Government of Cuba.

The Department of State issued only one reply,[1] a letter from the Under Secretary of State for Economic Affairs, dated November 14, 1961, reading as follows:

> DEAR MR. LAYLIN: The Secretary has asked me to reply to your letter of October 24, 1962 to him concerning certain litigation in which your client, the Cuban-American Sugar Company, is interested.
>
> I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts.
>
> Sincerely yours,
>
> /s/ GEORGE W. BALL,
> *Under Secretary for Economic Affairs*

In addition to the letter from Under Secretary Ball quoted above, the Court of Appeals was presented with another letter, written by the Legal Adviser of the Department of State. Since only part of that letter seems to have been presented to the court below (by means of Appendix V to the brief of the amici curiae, filed several months after the brief itself) and since the court apparently placed reliance on this letter, we shall set forth briefly the circumstances surrounding this letter and quote its full text.

---

[1] The Solicitor General's merely acknowledged receipt of the letter.

In the weeks following October 10, 1961, Mr. John Laylin, counsel for the amici curiae, wrote letters to several members of the Executive Branch and also sought appointments in order to present his arguments in person. He had made a tentative appointment with Mr. Chayes, the Legal Adviser, but the latter was forced to cancel the appointment because of a trip abroad. Shortly before he left for Africa, Mr. Chayes telephoned to Mr. Laylin to cancel the appointment, discuss the case briefly, and to suggest that Mr. Laylin talk with his Special Assistant, Mr. Lowenfeld, and with the Deputy Legal Adviser, Mr. Meeker, both of whom were familiar with the case. Confirming this telephone call, Mr. Chayes wrote the following letter to Mr. Laylin:

DEAR JOHN: I received your letter of October 10, 1961, as well as the copy of your letter of the same date to George Ball, which he has asked me to answer. As I mentioned on the telephone this afternoon, I am about to leave on a two-week trip to Europe and Africa. Let me just confirm here briefly the thoughts I expressed to you over the telephone.

The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalizations by Secretary Herter. Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine. Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself

point out, statements by the executive branch are highly susceptible of misconstruction.

I am sure that you will have a fruitful discussion with Mr. Meeker and Mr. Lowenfeld, both of whom are well informed on all of these cases.

With best regards,

Sincerely yours,

/s/ Abe,

ABRAM CHAYES.

In our view, Mr. Chayes' letter was in effect a refusal to express an opinion upon whether the Cuban nationalizations should be given effect in the courts either because of the Act of State doctrine or for any other reason. Regardless of its meaning, however, the full letter, as well as the circumstances, makes it clear that Mr. Chayes was not making an official expression of the views of the Executive Branch. The letter of the Under-Secretary, Mr. Ball, represents nothing more than a statement of "no comment." Mr. Laylin's subsequent letters are obviously self-serving.

The Court's invitation to the Solicitor General, at this stage of the proceeding, apparently does not seek an expression of the views of the Executive Branch upon the substantive merits of the questions presented. In the event that a writ of certiorari is granted, as urged in this memorandum, the Solicitor General will undertake to present a full statement of the position of the Executive Branch and supporting argument upon the merits.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1962.

APPENDIX A

List of Cuban cases assigned to Judge Frederick vP. Bryan, United States District Judge, Southern District of New York, for all purposes (as of December 5, 1962)

Banco Nacional de Cuba v. Chase Manhattan	60 Civ. 4663
Banco Nacional de Cuba v. Chemical Bank, etc.	61 Civ. 485
Banco Nacional de Cuba v. First Nat'l City Bank of New York	60 Civ. 4664
Banco Nacional de Cuba v. Irving Trust Co.	61 Civ. 1846
Banco Nacional de Cuba v. Manufacturers Tr.	61 Civ. 569
Banco Para el Comercio Exterior de Cuba v. Farr, Whitlock & Co., et al.	61 Civ. 411
Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank of New York	61 Civ. 410
Banco Nacional de Cuba v. Sabbatino, et al.	60 Civ. 3929
Compania Ron Bacardi S.A. v. Bank of Nova Scotia	61 Civ. 765
Cultural S.A. v. First Nat'l City Bank of New York	61 Civ. 1845
The First Bank of Boston v. Banco Nacional de Cuba	61 Civ. 2116
Godoy-Sayan, etc., et al. v. USAFORM Panamerican Ltd., et al.	61 Civ. 2496
Kraemer Mercantile Corp. v. Banco Nacional de Cuba	61 Civ. 1298

Republic of Cuba v. Lanborn & Co., Inc.	61 Civ. 1847
R.C.W. Supervisor, Inc. v. Cuban Tobacco Company, Inc., et al.	61 Civ. 2300
Miguel A. Quevedo, et al. v. Osle	60 Civ. 4195
Tabacalera Jose L. Piedra S.A. v. R.S. Wood Imported Cigars, Inc., etc.	61 Civ. 1177
Romeo y Julieta Fabrica de Tobacos S.A. v. Faber, Coe & Gregg, Inc.	61 Civ. 1749
Rey del Mundo Cigar Co. v. Dancico Imports, Inc.	61 Civ. 1748
A Quintero y Cia S.A. v. Dancico Imports	61 Civ. 1747
F. Palicio y Compania S.A., et al. v. Gilbert P. Brush, etc.	61 Civ. 2299
Por Larranaga, Fabrica de Tabacos S.A. v. Faber Coe & Gregg, Inc.	61 Civ. 582
F. Palicio y Compania, S.A. v. Faber Coe & Gregg, Inc.	61 Civ. 584
Cifuentes, etc. v. Faber, Coe & Gregg, Inc.	61 Civ. 583
Menendez, et al. v. Faber, Coe & Gregg	61 Civ. 472
Por Larranaga, Fabrica de Tabacos, S.A. v. Dunhill International, Inc., et al.	61 Civ. 850
F. Palicio y Compania, S.A. v. Dunhill International, Inc., et al.	61 Civ. 869
Cifuentes, etc. v. Dunhill International, Inc., et al.	61 Civ. 848
Menendez, et al. v. Dunhill International Inc., et al.	61 Civ. 849
Cifuentes, etc., et al. v. R.C.W. Supervisor, Inc., et al.	61 Civ. 2294
Menendez, etc., et al. v. Saks & Co.	61 Civ. 3336
Empresa Consolidada Cubana de Aviacion v. Collector of Customs of Port of New York, et al.	62 Civ. 1822

Robert I. Williams v. The University of Chicago	61 Civ. 4183
Three Stars Trading Co. v. Republic of [Cuba]	62 Civ. 757
Republic of Cuba v. Strauss	61 Civ. 711
Iengo v. Naviera Vacuba S.A. etc	60 Civ. 2341
Aero Associates, Inc. v. La Metropolitana, et al.	Civ. 148-86

APPENDIX B

COVINGTON & BURLING
UNION TRUST BUILDING
WASHINGTON 5, D.C.

OCTOBER 10, 1961.

The Honorable ARCHIBALD COX,
Solicitor General of the United States,
Department of Justice,
Washington, D.C.

DEAR MR. COX: In the recent litigation concerning the sovereign immunity of the Cuban ship *Bahía de Nipe*, the brief of your office filed with the Chief Justice made a subsidiary argument that the "act-of-state" doctrine requires American courts to give effect to foreign legislative acts even when they violate international law.

We realize that the *Bahía de Nipe* litigation is closed. We appreciate also that your brief recognized that sovereign immunity and not the "act-of-state" doctrine was the true issue there and that the "act-of-state" doctrine had been injected into the litigation by counsel for one of the petitioners.

We would not bother you about this were we not convinced that the contention, if adopted in cases now before our courts, would have an effect contrary to Executive policy. Cases I refer to do not involve hijacked property or any question of sovereign immunity. The *Sabbatino* case on appeal from Judge Dimock is the leading one.

At pages 29 through 34 of the enclosed brief, filed in that appeal, the cases cited by your office on the "act-of-state" doctrine are analyzed. We respectfully submit that none of them involved a violation

of international law. The closest is *Ricaud* v. *American Metal Company*, 246 U.S. 304 (1918). Analysis of the briefs and record before the Supreme Court demonstrates, however, that violation of international law was not established. The State Department had not protested the act as being in violation of international law. Indeed a requisition such as had taken place there accompanied as it was with a promise to pay later has been declared by our State Department to be not in violation of international law.

Sir Hersch Lauterpacht, in supporting his position that municipal courts should refuse effect to foreign decrees which violate international law, has pointed out:

> "The cases of *Underhill* v. *Hernández* (1897) 168 U.S. 250; *Oetjen* v. *Central Leather Co.* (1918) 246 U.S. 297; *Ricaud* v. *American Metal Co.* (1917) 246 U.S. 304; and, in particular *Luther* v. *Sagor*, [1921] 3 K.B. 532, frequently referred to in support of the proposition that courts must not question the legislation of foreign countries, are not germane to the present issue. There was no question, in these cases of foreign legislative acts contrary to International Law."

Under the circumstances of the *Bahia de Nipe* case there was, of course, a special situation. The property had been hijacked and there appears from the record to have been an understanding under which the State Department felt committed to return the vessel and its cargo. There was thus a situation comparable to that in *United States* v. *Belmont*, 301 U.S. 324 (1937), and *United States* v. *Pink*, 315 U.S. 203 (1942), cited in your brief.

Absent such a special situation, we believe your office will, on further review of the precedents and the broader policy considerations, agree that our

courts are not only not required to enforce foreign decrees which violate international law, but also are under an affirmative duty to refuse effect to such decrees particularly when our State Department has declared that foreign legislation to be "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West." We respectfully call your attention to pages 20 through 47 of the enclosed brief.

May we request that your office take these observations into account in any future case in which it is called upon to discuss the "act-of-state" doctrine.

I am taking the liberty of sending copies of this letter to the State Department, one copy to the attention of George Ball, and the other to Abram Chayes.

Sincerely yours,

JOHN G. LAYLIN.

COVINGTON & BURLING

UNION TRUST BUILDING

WASHINGTON 5, D.C.

OCTOBER 10, 1961.

Mr. GEORGE W. BALL,

Under Secretary of State for Economic Affairs, Department of State, Washington 25, D.C.

DEAR GEORGE: Enclosed is a copy of a letter I am sending today to Archibald Cox with respect to a subsidiary argument made in the brief of his office before the Chief Justice in the *Bahía de Nipe* case.

In one of the letters to the Department of Justice signed by the Secretary of State, the statement is made that "I understand" that the cargo of sugar as well as the vessel is the "property" of Cuba. This cargo was sugar taken by Castro from an American-owned company under a decree which the Depart-

ment of State protested against as being "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West."

You doubtless know that there are a number of cases before the American courts brought by Americans to salvage what they can from proceeds of the sale by the Cubans of sugar and tobacco taken without compensation from our nationals. There are other cases brought by Cuba against Americans to exact the last drop from them—and in dollar exchange—through the aid of our courts. The leading case is the *Sabbatino* case referred to in the letter to the Solicitor General. This is now on appeal. Our office has filed a brief amicus, a copy of which I enclose.

Under the special situation of the *Bahía de Nipe,* the vessel and cargo could be and was returned by the court's giving effect to the suggestion of sovereign immunity. This in no way prejudices the position of our nationals in the other cases that I have referred to. An argument, however might conceivably be made on behalf of the Cubans that the language in the Secretary's letter evidences some change in the Executive policy announced in the note of protest from which I have quoted. I am sure that this was furthest from the intention of the Secretary. I write now only to point out the possibility of such a misconstruction and request that you pass this letter and its enclosures on to those of your staff who may be called upon to deal with other cases having to do with sovereign immunity.

I am sending a copy of this letter and its enclosures to the Legal Adviser.

Sincerely yours,

JOHN G. LAYLIN.

670607—62——3

COVINGTON & BURLING
UNION TRUST BUILDING
WASHINGTON 5, D.C.

OCTOBER 10, 1961.

ABRAM J. CHAYES, Esq.,
Legal Adviser, Department of State,
Washington 25, D.C.

DEAR ABE: You will recall that sometime back I sent to your office copies of our brief in the appeal from Judge Dimock's decision in *Banco Nacional de Cuba* v. *Sabbatino,* and asked for an interview. Rather than take your time in a conference, we have tried to make in the enclosed letters the observations that we intended to call to your attention.

We have done some research on the question whether a court should refrain from proceeding with a case after the State Department issues a suggestion of sovereign immunity based solely on possession as distinguished from ownership. We have not turned up any case in which it was squarely decided that possession by the sovereign was by itself sufficient ground for the State Department to issue a suggestion of immunity, but the language in a number of cases indicates that a suggestion based solely on possession would be promptly given effect by the courts. A one page memorandum on this is enclosed.

May I make to you the same request that I made in the enclosed letter to the Under-Secretary, that you pass the enclosures on to those members of your staff who may be dealing with future sovereign immunity questions.

Sincerely yours,

John,
JOHN G. LAYLIN.

COVINGTON & BURLING
UNION TRUST BUILDING
WASHINGTON 5, D.C.

OCTOBER 17, 1961.

MR. GEORGE W. BALL,
Undersecretary of State for Economic Affairs,
Department of State,
Washington 25, D.C.

DEAR GEORGE: I phoned your secretary Friday for an appointment at your earliest convenience. The subject I wish to discuss I told her was set out in a letter to you dated October 10, 1961. I have just talked with her and she says the letter has not yet reached your office. I, therefore, promised to send and now enclose a copy.

Since writing you, attorneys for dealers who have trafficked in property confiscated by the Castro Government have seized upon the language used in the Secretary's letter to which I referred to argue that the State Department disagrees with its earlier position sustained by Judge Dimock in the *Sabbatino* case.

If the State Department had decided to reverse its earlier position, I am certain that it would not have done it in this offhanded manner. However, the grounds for confusion do seem to exist and it is for this reason that I would appreciate an opportunity to discuss the matter with you and with your legal adviser and the other persons you wish to have present.

Sincerely yours,

John,
JOHN G. LAYLIN.

DEPARTMENT OF STATE

WASHINGTON

OCTOBER 18, 1961.

DEAR JOHN: I received your letter of October 10, 1961, as well as the copy of your letter of the same date to George Ball, which he has asked me to answer. As I mentioned on the telephone this afternoon, I am about to leave on a two-week trip to Europe and Africa. Let me just confirm here briefly the thoughts I expressed to you over the telephone.

The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalizations by Secretary Herter. Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine. Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction.

I am sure that you will have a fruitful discussion with Mr. Meeker and Mr. Lowenfeld, both of whom are well informed on all of these cases.

With best regards,

Sincerely yours,

ABRAM CHAYES.

MR. JOHN G. LAYLIN,
Covington & Burling,
Union Trust Building,
Washington 5, D.C.

COVINGTON & BURLING
UNION TRUST BUILDING
WASHINGTON, D.C.

OCTOBER 18, 1961.

LEONARD C. MEEKER, Esq.,
Deputy Legal Adviser,
Department of State,
Washington 25, D.C.

DEAR MR. MEEKER: In anticipation of our meeting, I would like to call your attention to my letter of October 10, 1961, to the Undersecretary of State, a copy of which I sent to the Legal Adviser.

Yesterday, counsel in some thirty-one cases involving the Cubans were summoned before Judge vanPelt Bryan of the United States District Court for the Southern District of New York. Ky Ewing attended for this office. Attached is his memorandum to me on statements made to him after the session by Messrs. Rabinowitz and Boudin, counsel to the Castro Government.

They more than bear out my worst fears, expressed to the Undersecretary, that the statements made in the *Bahía de Nipe* litigation might be misconstrued.

I cannot believe that the Department of State has decided to lend its aid in the efforts of the Castro regime to consumate in our courts the seizures of American-owned property, against which the Department of State made "indignant protest".

I am equally sure that the Department would not want to help consumate these seizures by an ambiguity of language.

The purpose of my meeting with you is to find some way by which the Department can make its position clear without itself becoming involved in the merits of these cases.

Sincerely yours,

JOHN G. LAYLIN.

COVINGTON & BURLING
[illegible]
WASHINGTON 4, D.C.

OCTOBER 24, 1961.

The Honorable DEAN RUSK,
Secretary of State,
Washington 25, D.C.

DEAR MR. SECRETARY: We are counsel to various American companies that have suffered confiscation of their investments in Cuba by the Castro Government under Cuban decree No. 851 of July 6, 1960. Amongst these is the Cuban-American Sugar Company. Mills, railroads, power plants, dock facilities and cane lands owned by this Company, through subsidiaries, of a value well in excess of $100,000,000 have been confiscated without any compensation and without any means of redress through the courts of Cuba. Raw sugar of the Company worth millions of dollars has also been confiscated and has been sold by the Castro Government to dealers in this country, who in turn have sold it abroad and (with the one exception noted below) have received the proceeds. No compensation having been offered for any of this sugar, the Company is seeking to reduce its losses through court proceedings to have the proceeds paid over to the Company instead of to Cuba (*Cuban-American Sugar Co.* v. *Farr, Whitlock & Co.*, New York Supreme Court, County of New York, 16145/60; *Cuban-American Sugar Co.* v. *Farr, Whitlock & Co.*, New York Supreme Court, County of New York, 13591/60). The Company has also brought proceedings against a purchaser from the defendant in the foregong cases (*Cuban-American Sugar Co.* v. *Christman & Co.*, New York Supreme Court, County of New York, 8723/61). It has been ordered to interplede in

Banco Para el Comercio Exterior de Cuba v. *Farr Whitlock & Co.* (U.S. District Court for the Southern District of New York, 60 Civ. 411).

No element of sovereign immunity is involved in any one of these cases.

On behalf of the Company and certain of its subsidiaries, this firm has been permitted to file a brief amici curiae on the appeal from the decision of a United States district court, dated March 31, 1961, dismissing a suit brought by the Castro Government through its Banco Nacional de Cuba for the payment over to it of the proceeds of the sale outside of Cuba of sugar taken from Compania Azucarera Vertientes-Camaguey de Cuba, an American-owned company (*Banco Nacional* v. *Sabbatino*, 193 F. Supp. 375). The proceeds are presently held by Mr. Sabbatino, the temporary receiver appointed to protect for American stockholders and creditors the assets in New York of that company.

Another law firm has also been given leave to file a brief. They state that their brief will be in support of the contentions of the Cuban Government. An affidavit accompanying the motion for leave to file the brief construes certain statements made in connection with the recent *Bahia de Nipe* litigation as expressing an Executive policy that the courts of the United States should refrain from questioning the lawfulness under international law of the seizures made under Cuban decree No. 851 and should give effect in the United States to the takings.

No element of sovereign immunity is involved in the *Sabbatino* case.

Cuban decree No. 851 was manifestly in violation of international law, as the State Department pointed out in its note of protest to the Government of Cuba dated July 16, 1960. The seizures under that law of

the properties of some twenty-one named American-owned companies were the subject of "indignant protest" by the Department on August 9, 1960. Seizures of property of the Cuban-American Sugar Company were the subject of a specific note of protest delivered to the Government of Cuba by the American Embassy in Habana on August 13, 1960.

Involved in the seizures was a shipment of sugar sold by the Company to an American dealer which in turn had sold it to a sugar refinery in Morocco. This shipment was financed by the International Cooperation Administration. In line with the position taken by the Executive, that agency of your Department directed that the dollar funds set aside for payment for the shipment should be paid to the Company, to the dealer or to other parties as determined in "a final non-appealable judgment of a court of the United States or the State of New York." Amendment No. 608-40, dated October 4, 1960, to letter of Commitment to the Bank of America dated March 22, 1960.

Following the issuance of this order, the Company brought suit against the American dealer. This case, one of those listed above, is now pending in the Supreme Court of the State of New York. Notice of this proceeding and of the order of the ICA was given to the Embassy of the Government of Cuba in Washington on October 24, 1960. Thus far the Government of Cuba has not taken advantage of the opportunity afforded to it to intervene in the proceedings.

In another case (*Kane* v. *National Institute of Agrarian Reform*, No. 61 L. 730, Fla. Cir. Ct. 11th Dist., June 8, 1961) involving the question of the effect to be given in this country to the Cuban decrees of confiscation, the State Department at the request of attorneys for the plaintiff replied by telegram that "Effect in U.S. of Decrees, etc. of Castro regime is

question for court in which case heard." The court took notice of this telegram in its opinion.

We would have thought that it was well settled in view of the foregoing that the Executive Branch of our Government did not take exception, in a case involving no suggestion of sovereign immunity, to a judicial determination as to the propriety of inquiring into the lawfulness of the Cuban seizures and as to the effect to be given in the United States to those takings.

In the light of the precedents analyzed in the brief which we have filed for friends of the court in the *Sabbatino* case (copies of which have been given to your Legal Adviser), we believe it to be the duty of the courts to inquire into the lawfulness of acts challenged as violating international law, especially when the State Department has itself protested to the state making the seizures on the grounds of a violation of international law. Under the precedents we consider that in such a case the courts and the parties to the litigation need look to the Executive for guidance only if statements are made by the Executive susceptible of a construction that it would embarrass the Executive in the conduct of our foreign affairs were the courts to inquire into the lawfulness of the seizures.

As stated above, certain statements have been made in connection with the *Bahia de Nipe* case which are seriously construed by well established law firms as indicating a new Executive policy at variance with that previously expressed in the notes, the order and the reply mentioned above. These firms have given notice that they will urge the courts to order payment to Cuba of the proceeds in this country of the sale outside of Cuba of sugar shipped from Cuba with the consent of the present government of Cuba.

They contend that the Executive power has expressed a desire that the courts reach this result notwithstanding that the sugar was seized from American-owned companies under a decree protested by the United States as in violation of international law.

We believe that the Executive did not intend by the statements cited by these other law firms to express any such desire. We are convinced that there is not any such desire on the part of the Executive. We believe that the courts will reach the same conclusion. Further, we believe that if so drastic a change of policy were intended it would be stated in an unambiguous manner making clear that it was a new and different policy.

Nevertheless, the argument has been advanced and is being urged seriously by responsible law firms. Under the circumstances silence by the State Department may be construed by them (and no doubt by potential new expropriators) as acquiescence in their interpretations or at least as a wavering in the upholding of the policy so forthrightly stated in the notes, order and reply mentioned above.

The litigation under reference is expensive for the American companies concerned without the added complication of drawn out debate as to the wishes of the Executive Branch. A simple telegram such as was sent at the request of attorneys for the plaintiff in the *Kane* case that "Effect in U.S. of Decrees, etc. of Castro regime is question for court in which case heard" would, it is believed, suffice to spare the attorneys on all sides and their clients the time and expense of debating and the courts the time and expense of hearing arguments and deciding whether or not the Executive Branch has changed its policy.

If it is the policy of the State Department to leave the effect to be given in the United States to the

Cuban nationalizations heretofore described as being in violation of international law to the courts for their determination in cases not involving a suggestion of sovereign immunity, we respectfully request that this be confirmed to us in a communication that can be added to the record of the appropriate cases.

Will you kindly address the communication jointly to Covington & Burling, 701 Union Trust Building, Washington 5, D.C., attention of the undersigned, and to our co-counsel, Debevoise, Plimpton & McLean, 320 Park Avenue, New York, New York, attention of Mr. Edward C. McLean.

Respectfully yours,

JOHN G. LAYLIN.

COVINGTON & BURLING
UNION TRUST BUILDING
WASHINGTON 5, D.C.

OCTOBER 26, 1961.

MR. ANDREAS F. LOWENFELD,
Office of the Legal Adviser,
Department of State, Washington 25, D.C.

DEAR MR. LOWENFELD: As promised at our conference on Monday, I am enclosing a copy of the Solicitor General's memorandum in opposition to the United Fruit petition for stay in the *Bahia de Nipe* case, along with a copy of the endorsement by the Chief Justice in his denial of the stay.

May I add that in view of your comments about *Oetjen* v. *Central Leather Co.*, *Ricaud* v. *American Metal Co.* and the *Bernstein* cases, I have once again reviewed these cases. In none of them, it seems to me, was the court faced with a violation of international law.

In *Oetjen*, the Supreme Court expressly stated: "Plainly this was action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen. * * *" (246 U.S. 297, 303).

Likewise in *Bernstein*, at the time the properties were seized, Mr. Bernstein was a citizen of the German Reich. Moreover, Judge Learned Hand defined the act-of-state doctrine as follows: "* * * a court of the forum will not undertake to pass upon the validity under the *municipal* law of another state of the acts of officials of that state, purporting to act as such" (163 F. 2d. 246, 249). [Emphasis added.]

Because in these cases the court was dealing with an act of state directed at a national of the acting state, there could have been no violation of international law. (The day may come when citizens may invoke international law against the government of their own country but, except perhaps for genocide, that is not existing law.)

This leaves *Ricaud*. We have looked at the record and briefs on file in addition to the opinion of the Supreme Court. The facts are relatively simple. American Metal Company, an American national, claimed to have purchased lead bullion from the Penoles Mining Company, a Mexican corporation owned by American Metal. After title had passed to American Metal, but while the bullion remained physically at Penoles Mining Company, General Pereyra, as Military Commander of the forces of General Carranza (whose government the United States later recognized), requisitioned the bullion and used the proceeds of its resale to supply food and arms for his troops. His requisition was accompanied by a promise to pay when hostilities ceased and a stable government was set up.

American Metal brought suit in Federal Court against Ricaud (the purchaser from Pereyra) and Barlow (the purchaser from Ricaud), along with the Collector of Customs at El Paso (who had temporary custody of the bullion). The District Court ruled in favor of American Metal and the Court of Appeals certified three questions to the Supreme Court. These questions assumed that the property had been taken from American Metal, but there is nothing to indicate that the questions assumed a violation of international law.

As the Claims Section of the Legal Adviser's Office has pointed out many times, a taking of property from an American citizen is by no means automatically a violation of international law.

There is nothing in the record to indicate that American Metal had attempted to obtain fulfillment of General Pereyra's promise to pay or to exhaust remedies in the courts of Mexico (which were open to it). Ricaud and Barlow argued to the Supreme Court that a requisition in time of war was lawful under international law. Certainly, it is clear that a requisition with a promise to pay upon cessation of hostilities is not *ab initio* a violation of international law. See, *e.g., Georges Pinson,* [1927–28] Ann. Dig., Case No. 370. That the Department of State considers that "proper compensation" for a requisition in time of civil strife may include a promise to pay in the future is made clear from its declaration in the Turkish requisitions that if immediate payment "was impractical", there should be "acknowledgment made by receipt with a view to future payment." VI Hackworth, Dig. Int'l L. 253. See, in general, VI Hackworth, Dig. Int'l 638–655.

Only if American Metal could have shown that its remedy in the courts of Mexico had been ex-

hausted without fulfillment of the promise to pay, could the Department of State have espoused a diplomatic claim for just compensation. Neither the record nor the Supreme Court opinion contains any reference to any declaration by the Department of State protesting the requisition as being in violation of international law.

It seems to us clear that while the Supreme Court had before it certified questions which assumed a requisition of property from an American national, it did not have before it a violation of international law.

Nothing in the *Ricaud* decision affected the right of American Metal to seek just compensation in the Mexican courts under Mexican law or, if there followed a denial of justice or exhaustion of remedies without compensation, to seek redress through the Department of State. The language in the Supreme Court opinion referring American Metal Co. to the "courts of Mexico" or the "political departments of our Government" is fully consistent with this view. (246 U.S. 304, 310).

We think Judge Dimock was correct when he pointed out that *Ricaud* simply "does not supply an answer to the problem in the present action", namely the effect to be given by our courts to a decree clearly violative of international law and protested against for that reason by our Executive.

Sincerely yours,

KY P. EWING, JR.

COVINGTON & BURLING
UNION TRUST BUILDING
WASHINGTON 5, D.C.

NOVEMBER 3, 1961.

The Honorable GEORGE W. BALL,
Under Secretary of State for Economic Affairs,
Department of State,
Washington 25, D.C.
Attention: Arthur Hartman.

DEAR MR. SECRETARY: On October 17, 1961, I wrote you with respect to certain statements that might create confusion on the part of the courts in determining what is the Executive policy with respect to judicial determination of the effect to be given in this country to seizures by the Castro Government under decrees protested as being in violation of international law. This question has been referred to the Legal Adviser who is now studying the matter.

There are economic policies involved which I have no doubt the Legal Adviser has in mind, but, because they are of primary concern to your office, to the office of Assistant Secretary Woodward and to the Agency for International Development, I am nevertheless taking the liberty of sending to you and Mr. Hamilton copies of a letter which I sent to Mr. Woodward and of the memorandum referred to in that letter.

Sincerely yours,

JOHN G. LAYLIN.

Enclosures.

COVINGTON & BURLING
UNION TRUST BUILDING
WASHINGTON 5, D.C.

NOVEMBER 3, 1961.

Mr. ROBERT F. WOODWARD,
Assistant Secretary for Inter-American Affairs,
2201 C St. N.W., Washington, D.C.

DEAR MR. WOODWARD: As attorney for the Cuban-American Sugar Company, I have recently written the Legal Adviser of the State Department to request a statement for submission to the courts in which certain actions involving Cuban-American are pending. These actions raise the question of the validity and effect of Cuban confiscations of the sugar of Cuban-American, and a statement was requested as to whether State Department policy favored the courts' inquiry into the validity and effect of the seizures.

I am, as you know, also counsel for other companies with investments in Latin America and companies considering investing there. While the statements requested with respect to the pending cases are adequate to protect the interests of the American investors involved in those cases, I believe that something more is needed in the way of a statement of general application. A general statement is needed in order not only to protect the interests of my other clients, but to encourage the American investment in Latin America which is necessary for carrying out the Alianza para el Progreso.

The enclosed memorandum explains these views and the reasons behind them.

Sincerely yours,

JOHN G. LAYLIN.

NOVEMBER 3, 1961.

MEMORANDUM

RE: SUGGESTED PUBLIC STATEMENT OF THE EXECUTIVE POLICE WITH RESPECT TO JUDICIAL DETERMINATION OF THE EFFECT TO BE GIVEN HERE TO FOREIGN DECREES VIOLATING INTERNATIONAL LAW

The delegates to the conference at Punta del Este were unanimous in expressing the urgent need for far-reaching economic development throughout this hemisphere. The less developed nations face, however, a choice between two possible routes to this end—that of Communism on the one hand, that of free enterprise coupled with far-sighted governmental planning on the other. Of the nations represented at Punta del Este, all but Cuba have chosen the latter course. Their delegates, in the "Declaration to the Peoples of America" signed at the conference, stated that it was their goal

> "To stimulate private enterprise in order to encourage the development of Latin American countries at a rate which will help them to provide jobs for their growing populations, to eliminate unemployment, and to take their place among the modern industrialized nations of the world."

Clearly it is the policy of the United States as a leading force behind the Charter of Punta del Este to encourage private investment by both local and foreign investors as an essential element in the economic progress of the hemisphere—and of the rest of the free world as well.

In implementing this policy for economic progress, American investors play a crucial role.[1] Present plans under the Alianza para el Progreso, for instance, call for some $300,000,000 to be invested in Latin America each year for the next ten years by American investors alone.[2]

The need for the services and the funds of American investors as instruments of American foreign policy is not, of course, limited to this hemisphere. Private investment is essential wherever our Government seeks to lend its aid. The question of the role of American investors and of the protection they will be afforded by our Government has, however, been most sharply presented in the context of Latin America by the course of events in Cuba under Castro, and particularly by the Cuban confiscations of American property of a summer ago.

The United States Government has clearly indicated its disapproval of the course Castro has taken. Not only has our Government broken off diplomatic relations with Cuba, but it has placed an embargo on shipments from the United States. The reduction in Cuba's sugar quota indicates that the United States does not intend to finance Castro's progress to Communism with dollar exchange. The seizures of American property have been repeatedly protested through diplomatic channels as violations of international law. No one in the Administration or in the Congress has been heard to argue that our policy of disapproval of

---

[1] "Private enterprise's most important future role will be to assist in the development of healthy and responsible private enterprise within the Latin American nations." President's Message to Congress, Mar. 14, 1961, 44 Dept. State Bull. 474, 478 (April 3, 1961).

[2] Address of Secretary of the Treasury Douglas Dillon to Los Angeles World Affairs Council, Sept. 11, 1961.

the Castro regime and its confiscations should be softened. Everywhere it is recognized that to encourage the Castro Government would be to encourage those elements in other states that wish to have their countries follow the path of confiscation and, ultimately perhaps, of Communism.

Nevertheless, at the present time agents of the Cuban Government, or purchasers from them, are asking the third branch of government, the courts, to take action which would help to consummate the Castro confiscations[2] and would encourage similar unlawful confiscations in other countries. They argue that for the courts to do otherwise would not be consistent with Executive policy. In other words, taking advantage of the reluctance of the courts to pass upon matters which are closely related to the conduct of our foreign relations, they are seeking a result which would open up the United States as a market in which Cuba and other countries following in Castro's footsteps could trade in illegally taken American property and obtain from its sale dollar

---

[2] The following cases are now pending: Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (1961), appeal docketed, No. 26986, 2d Cir.; Kane v. National Institute of Agrarian Reform, No. 61L.730, Fla. Cir. Ct., 11th Dist., June 8, 1961, notice of appeal filed Sept. 12, 1961; Cuban-American Sugar Co. v. Farr, Whitlock & Co., No. 16145/60, N.Y. Sup. Ct., Cou. of N.Y.; Cuban-American Sugar Co. v. Farr, Whitlock & Co., No. 13591/60, N.Y. Sup. Ct., Cou. of N.Y.; Cuban-American Sugar Co. v. Christman & Co., No. 8723/61, N.Y. Sup. Ct., Cou. of N.Y.; Banco para el Comercio Exterior de Cuba v. Farr, Whitlock & Co., No. 60 Civ. 411, S.D.N.Y.

In addition, some 28 cases involving property "nationalized" by Cuba are now pending in the United States District Court for the Southern District of New York. It appears likely that at least some of these cases raise the same issues of the legality and effect of the decrees of confiscation as are presented in the six cases cited above.

exchange to support the Castro regime and the spread of its influence throughout Latin America.

While all of the American states represented at Punta del Este, excepting Cuba, subscribed to the necessity of stimulating private enterprise, it must be recognized that there are elements in many of those countries that are working in an opposite direction. They are working for the route of confiscation of private property and total government control following the example of the Castro regime and the countries it has taken as its model. These elements are not opposed to accepting public funds from the United States, but they are working to undermine private investment both local and foreign. They are watching this country eagerly to see whether we will carry out the request of the Cuban Government to help it consummate its illegal seizures of American property.

On the other side potential investors, both local and foreign, are following with keen interest the steps being taken by us to protect investments now existing and those to be made. These investors are not unaware of the arguments being made that the courts should give effect to the Cuban confiscatory decrees. So long as the State Department does not make known generally its policy in this matter, these potential investors are being discouraged from committing their funds to assist in carrying out an essential feature of the Alianza para el Progreso. Uncertainty can also have the effect of encouraging harassment of companies that already have heavy investments in Latin America.

The State Department has made clear, in a telegram in the *Kane* case, that the courts need not serve without question as Castro's collection agents: it has stated the policy of the Executive to be that the court should feel free to inquire into the lawfulness of the

decrees and to decide what effect, if any, should be given to them. A telegram such as was sent in the *Kane* case is adequate to dispose of the risk that a court, out of deference to what it supposed to be the position of the State Department, would carry out decrees that are demonstrably obnoxious to the Executive. It is respectfully submitted, however, that the existence of such telegrams may not be widely enough known to warn the elements in foreign countries that would follow the footsteps of Castro or those that would trade in confiscated American property of the clear-cut policy of the Executive to discourage such violations of international law.

It is submitted that the time has come for a statement of the policy of the United States in an official public announcement of general and prospective application.

It will be appreciated that we are not suggesting a statement as broad as that which has been recommended by the Committee on International Law of the Association of the Bar of the City of New York.[4] Their recommendation would appear to open the door to the consideration by the courts of the validity of foreign acts of any nature. Our suggestion deals only with the pressing problems now before the courts and now on the way. It is limited to those cases, of which the seizures by the Castro Government under Cuban Law No. 851 are examples, involving confiscations that are manifestly in violation of international law. It is imperative, we submit, that at least the cases of this sort be dealt with now by a public statement.

Whatever form the public statement might take, the substance would be that in cases involving tak-

[4] A Reconsideration of the Act-of-State Doctrine in United States Courts, May 12, 1959.

ings of property of American nationals by a foreign government where a plea of sovereign immunity is not sustained but where there is a demonstrable violation of international law, it is consistent with Executive policy for the courts to decide what effect, if any, is to be given here to such seizures.

JOHN G. LAYLIN.

LAW OFFICES

HAROLD L. FISHER

JOSEPH SLAVIN
ROSS J. DILORENZO

50 COURT STREET, BROOKLYN 1, N.Y.,

November 6th, 1961.

Re: Schwartz v. Compania Azucarera, Vertientes-Camaguey De Cuba, (Banco Nacional de Cuba v. Sabbatino, et al.).

The Honorable DEAN RUSK,
Secretary of State,
Washington, D.C.

DEAR MR. SECRETARY: On August 16, 1961, the Supreme Court of the State of New York, County of Kings, under Section 977-b of the Civil Practice Act of the State of New York, appointed Mr. Peter L. F. Sabbatino the Temporary Receiver of the assets in New York State of Compania Azucarera Vertientes-Camaguey de Cuba. Said corporation is a Cuban corporation whose stock was actively traded on the New York stock exchange. I am advised that approximately 96% of the stock of the corporation was owned by American citizens or residents. The undersigned are the Court appointed attorneys for the aforesaid Temporary Receiver.

All of the properties in Cuba of this company were nationalized and confiscated by the Castro government on August 6, 1960, under Cuban decree No. 851. The

assets so nationalized and confiscated were valued at approximately $25,000,000.00.

Among the assets which the Temporary Receiver collected pursuant to his authority under the aforesaid Section 977–b, was the sum of approximately $175,000.00 representing the proceeds of the sale by a New York sugar dealer of a shipload of the corporation's sugar. Such funds were paid over to the Temporary Receiver by the sugar dealer under order of the aforesaid Supreme Court of the State of New York, County of Kings.

The Castro government, acting through its Banco Nacional de Cuba, brought suit against the Temporary Receiver in the United States District Court for the Southern District of New York to obtain this $175,000.00, arguing that our courts must help Cuba consummate the nationalization and seizure of the sugar by enforcing actions taken by the Cuban government pursuant to and under the authority of the Cuban decree No. 851.

On March 31, 1961, the said District Court (Mr. Justice Edward J. Dimock) dismissed the Castro government's suit (193 F. — Supp. 375). The Court's decision held, among other things, that as an American court is charged with enforcing international as well as local municipal law, it could not give effect in this country to Cuban decree No. 851 and the nationalization and seizures made pursuant thereto, since they violated international law. This dismissal is now under appeal to the Circuit Court of Appeals for the Second Circuit.

As you are aware, the State Department protested to Cuba in a note dated July 16, 1960, that Cuban decree No. 851 was "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West." By note

of August 9, 1960, the State Department made "indignant protest" against the seizures effected under this decree.

During the course of our defense of the District Court suit, it was ascertained that a second shipment of sugar, likewise seized by the Castro government, was likewise purchased from said government by the same sugar broker involved in our case. It was ascertained that this particular sugar shipment was financed by the International Cooperation Administration. Consistent with the notes of protest of our Government, that agency of your Department declined to make the proceeds available to the purchaser, and amended its letter of commitment so as to require the question of the effect of the Cuban seizures to be decided by an American court. (Amendment No. 608–40 dated October 4, 1960, to letter of commitment to the Bank of America dated March 22, 1960).

In connection with other matters involving Cuban nationalization, confiscation and intervention decrees, it has come to my attention that the attorneys for the Castro Government find in certain recent governmental statements, a change in the Executive policy of our Government. They maintain that by statements made in the *Bahia de Nipe* litigation, with which your legal advisor I am sure is familar, the Executive Branch has (in a note from you to the Attorney General and in a memorandum filed by the Department of Justice with the Chief Justice of the United States) indicated its desire that our courts give effect here to Cuban nationalizations and confiscations, even in cases where no question of sovereign immunity is involved.

Also in direct connection with the Sabbatino case, it has been asserted that in the *Bahia de Nipe* case, the Department of State informed the court, which

considered that matter, that the Cuban Government was the owner of certain sugar which had been acquired by the same type of seizure that Judge Dimock, in the Sabbatino case, found illegal. I cannot believe that such a change in the policy of the Executive Branch of our Government, from its position as stated in its notes of July 16, 1960 and August 9, 1960 would have been announced in such a manner.

This letter is written as a request for your Department to shed some light upon the question of whether or not the Executive Branch of our Government has changed its announced policy in connection with the Cuban nationalizations and seizures. Has the Department of State, in the *Bahia de Nipe* case or elsewhere, taken a position with respect to the Castro seizures under Decree No. 851 inconsistent with that taken in the notes mentioned above, and does it continue to be the Executive position that the question whether or not these nationalizations will be given effect in the future in the United States, in cases not involving the question of sovereign immunity, is for the Judiciary to determine.

Very truly yours,

HAROLD L. FISHER
and
ROSS J. DILORENZO,
By HAROLD L. FISHER.

COVINGTON & BURLING
UNION TRUST BUILDING
WASHINGTON, D.C.

NOVEMBER 21, 1961.

The Honorable GEORGE W. BALL,
Under Secretary for Economic Affairs,
Department of State, Washington 25, D.C.

DEAR MR. BALL: Thank you for your reply to my letter of October 24, 1961 addressed to the Secretary of State concerning litigation in which my client, The Cuban-American Sugar Company, is interested. You state:

> "I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts."

I fully appreciate and believe every lawyer will applaud this position. The Department, as you know, had already taken the position in response to the inquiry from the litigants in the case of *Kane* v. *National Institute of Agrarian Reform* that, "Effect in U.S. of Decrees, etc. of Castro regime is question for court in which case heard." It was only because certain of the litigants in cases in which my client is interested had argued that certain recent statements made in connection with the *Bahia de Nipe* litigation were to be construed as indicating a change in the Executive policy that I felt it desirable to have a reaffirmation. On October 18, 1961 the Legal Adviser confirmed:

> "The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalizations by Secretary Her-

ter. Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine. Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction."

On the basis of this correspondence, I am satisfied that the litigants in the cases involving the effect to be given in this country to the confiscatory decrees of the Castro regime will be spared the expense and loss of time involved in speculating as to whether the Department had indeed changed its position.

I appreciate your attention to this matter.

Sincerely yours,

JOHN G. LAYLIN.

U.S. GOVERNMENT PRINTING OFFICE: 1964